Mailed: February 2, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Cerevisiae Industries, LLC
v.
Brawling Bear Brewing, LLC

Cancellation No. 92070268

Karen Kreider Gaunt of Dinsmore & Shohl LLP,
for Cerevisiae Industries, LLC.

Brian D. Kaider of KaiderLaw,
for Brawling Bear Brewing, LLC.

Before Bergsman, Greenbaum, and Heasley,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Respondent, Brawling Bear Brewing, LLC, owns a Principal Register registration for BRAWLING BEAR BREWING and Design (disclaiming "BREWING"), shown below, for "beers," in International Class 32, and "bar services; pubs" in International Class 43:[1]

[1] Registration No. 5530795, issued July 31, 2018, from Application Serial No. 87061117, filed June 6, 2016 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), later alleging Oct. 31, 2016 as the date of first use anywhere and Nov. 16, 2017 as the date of first use in commerce.

The registration includes the following description: "The mark consists of a short stroke, ink drawing of standing bear, that is growling while wearing boxing gloves and contains the words 'Brawling Bear Brewing.'" Color is not claimed as a feature of the mark.

I. Procedural Background

Petitioner, Cerevisiae Industries, LLC, seeks cancellation of Respondent's registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the basis of priority and likelihood of confusion with its previously registered standard character mark BOXING BEAR BREWING COMPANY (disclaiming "BREWING COMPANY") for "beer" in International Class 32.[2] It also claimed common law rights in the mark

[2] Reg. No. 4786347, issued on Aug. 4, 2015 from Application Serial No. 85958089, filed on June 12, 2013 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), later alleging

in connection with taproom and related services.[3]

In its Answer, Respondent denied the salient allegations of the petition for Cancellation, although it admitted that:

> the specimens submitted in support of the application that matured into Registration No. 5,530,795 included images of a bear wearing red boxing gloves. Respondent avers that it also uses images of bears wearing boxing gloves of different colors and that color is not a claimed feature of the 5,530,795 mark.[4]

Petitioner offered no evidence during its trial period, and its motion to reopen its testimony period was denied.[5] Despite this dearth of evidence, Respondent's motion for involuntary dismissal was denied because Petitioner's pleaded registration for BOXING BEAR BREWING COMPANY was properly of record.[6] A copy of the registration and its electronic record from the USPTO Trademark Status and Document Retrieval (TSDR) database showing its current status and title in Petitioner were attached as Exhibit A to the Petition for Cancellation.[7] The case will therefore proceed based on Petitioner's cited registration, not on its claimed common

---

July 25, 2014 as the date of first use anywhere and February 9, 2015 as the date of first use in commerce.

[3] Petition for Cancellation ¶ 10, 1 TTABVUE 5.

[4] Answer ¶ 21, 8 TTABVUE 5. Respondent also asserted the affirmative defenses of laches and failure to police Petitioner's mark, 8 TTABVUE 7, but did not pursue them in its final brief, so they are waived. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1422 (TTAB 2014) ("As applicant did not pursue the affirmative defenses of failure to state a claim and unclean hands, either in its brief or by motion, those defenses are waived."). *See also TPI Holdings, Inc. v. TrailerTrader.com LLC,* 126 USPQ2d 1409, 1413 n.28 (TTAB 2018) ("Respondent also asserted 'estoppel, acquiescence and waiver,' but does not argue any of these in its brief. They are therefore waived."). The remaining "affirmative defenses" are amplifications on Respondent's denial of likelihood of confusion.

[5] Board Order, 18 TTABVUE 1-7.

[6] Board Order, 18 TTABVUE 7-9, citing Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1).

[7] 1 TTABVUE 12-17.

law rights.

II. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Respondent's registration. The record also includes:

A. Respondent's Evidence

- Respondent's first notice of reliance, containing Petitioner's responses to Respondent's Requests for Admission, Requests for Production of Documents, and Interrogatories;[8]

- Respondent's second notice of reliance, designated as confidential, containing a document produced by Petitioner comprising text messages with one of Petitioner's partners concerning a can of beer bearing Respondent's mark;[9]

- Respondent's third notice of reliance, containing:

    - Third-party U.S. trademark registrations using words or images relating to:
        - Bears
        - Boxing,
        - Animals, including bears, fighting,
    - Internet materials showing boxing themes used in advertising and marketing beer and other alcoholic beverages,
    - Internet materials purporting to distinguish between "boxing" and "brawling";[10]

- Respondent's fourth notice of reliance, containing online dictionary definitions of "GTFOH," a term used in one of the text messages in the document contained in Respondent's second notice of reliance.[11]

[8] 19 TTABVUE.

[9] 21 TTABVUE.

[10] 22 TTABVUE.

[11] 20 TTABVUE.

B. Petitioner's Evidence

- Petitioner's cited registration, attached to its Petition for cancellation;[12]
- Petitioner's Rebuttal notice of reliance, containing:
    - Exhibit A: A web page from Petitioner's website, BoxingBearBrewing.com;[13]
    - Exhibit B: Petitioner's Facebook page: Facebook.com /boxingbearbrewing/ photos;[14]
    - Exhibit C: A web page from Respondent's website, BrawlingBear.com;[15]
    - Exhibit D: Third-party U.S. trademark registrations purporting to show the lack of third party use of "brawling," "boxing" or "fighting" bear imagery for beer, bars or pubs;[16] and
    - Exhibit E: Online dictionary definitions of "boxing" and "brawl."[17]

III. Evidentiary Issue

Respondent moves to strike exhibits A through D from Petitioner's rebuttal notice of reliance on the ground that they are not proper rebuttal.[18] Petitioner argues that its exhibits A through C—online pages showing the parties' respective beer cans under their respective marks—are relevant to rebut Respondent's third-party

[12] 1 TTABVUE 12-17.

[13] Ex. A, 23 TTABVUE 6.

[14] Ex. B, 23 TTABVUE 8.

[15] Ex. C, 23 TTABVUE 10.

[16] Ex. D., 23 TTABVUE 3, 12-288.

[17] Ex. E, 23 TTABVUE 291-317.

[18] Respondent's brief, 25 TTABVUE 6.

registration evidence regarding the strength or weakness of Petitioner's mark.[19] We find, however, that this evidence pertains to a comparison of the parties' marks, not their strength. "This rebuttal evidence was not submitted for the proper purpose of denying, explaining or discrediting [Respondent's] case but instead was clearly an attempt by [Petitioner] to strengthen its case-in-chief." *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1632 (TTAB 2007). As such, it is improper rebuttal, and will not be considered. *Life Zone Inc. v. Middleman Grp., Inc.,* 87 USPQ2d 1953, 1958 (TTAB 2008) ("A plaintiff may not present its case-in-chief in rebuttal merely because the defendant denies that the plaintiff has made its case during its case-in-chief.").

On the other hand, Petitioner's exhibit D, consisting of third-party registrations, responds directly to Respondent's third notice of reliance, which contains numerous third-party registrations offered to show that Petitioner's mark is weak and entitled to a limited scope of protection. Although Petitioner's exhibit has limited probative value, it is admissible as proper rebuttal, and will be considered solely for this purpose. *Id*.

IV. Priority and Entitlement to Statutory Cause of Action

When both parties in a cancellation proceeding own registrations, as is the case here, the petitioner must prove its priority. *Brewski Beer Co. v. Brewski Bros., Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998). In this case, Petitioner filed its application for its BOXING BEAR BREWING COMPANY word mark on June 12, 2013, and the application matured into its cited registration on August 4, 2015—all before

[19] Petitioner's reply brief, 26 TTABVUE 7-8.

Respondent filed the June 6, 2016 intent-to-use application that matured into its subject registration. *See Calypso Tech. Inc. v. Calypso Capital Mgmt. LP*, 100 USPQ2d 1213, 1219-20 (TTAB 2011) (petitioner's priority established based on filing date of the underlying application, which matured into its pleaded registration). Respondent does not dispute that Petitioner's registered mark has priority.[20]

Respondent contends, however, that Petitioner has provided no evidence of a reasonable basis for its belief of damage by Respondent's registration, so the petition for cancellation should be dismissed for lack of standing.[21] We now refer to standing as entitlement to a statutory cause of action. *Major League Soccer, LLC v. F.C. Int'l Milano S.p.A.*, 2020 USPQ2d 11488, at *5 n. 18 (TTAB 2020). Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *4 (Fed. Cir. 2020). As the Court of Appeals for the Federal Circuit has observed, there is "no meaningful, substantive difference between the analytical frameworks" in the prior "standing" case law, under which a plaintiff must show a real interest in the proceeding and a reasonable basis for its belief in damage, *see Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), and the current "entitlement" case law, under which a plaintiff must show an interest falling within the zone of interests protected by statute and damage proximately caused by registration. *Corcamore v.*

[20] Respondent's brief, 25 TTABVUE 10.

[21] Respondent's brief, 25 TTABVUE 10-11.

SFM, 2020 USPQ2d 11277, at *4. Thus, "a party that demonstrates a real interest in cancelling a trademark under [15 U.S.C.] § 1064 has demonstrated an interest falling within the zone of interests protected by § 1064. Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 1064." *Id*. at *7.

"To establish a reasonable basis for a belief that one is damaged by the registration sought to be cancelled, a petition may assert a likelihood of confusion which is not wholly without merit…." *Lipton Indus., Inc. v. Ralston Purina Co.,* 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) *quoted in Corcamore v. SFM*, 2020 USPQ2d 11277, at *8. In this case, Petitioner's pleaded registration, made of record in the petition for cancellation, shows that its claim of confusing similarity between the parties' marks, as used on or in connection with their respective goods and services, is sufficiently meritorious to entitle it to pursue its cause of action under Section 1064. *Id. See also Cunningham v. Laser Golf Corp*., 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton v. Ralston Purina*, 213 USPQ at 189.

V. Likelihood of Confusion

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts of record. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"). In assessing likelihood of confusion, we consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.,* 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). "Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered." *Zheng Cai v. Diamond*

Hong, Inc., 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented in a particular case. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) ("the various evidentiary factors may play more or less weighty roles in any particular determination"). "In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services." *In re Chatam Int'l Inc.,* 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004), *cited in Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, *5 (TTAB 2019).

Petitioner bears the burden of proving a likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf*, 55 USPQ2d at 1848. We determine whether Petitioner has met this burden in sequence: first as to Respondent's goods, "beers," and second as to Respondent's services, "bar services, pubs."

A. Similarity of Goods and Channels of Trade; Conditions of Purchase

The second *DuPont* factor concerns the "similarity or dissimilarity and nature of the goods or services as described in an application or registration," *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014). In this case, the parties' goods, identified as "beer" and "beers," are identical.

The third *DuPont* factor concerns "'[t]he similarity or dissimilarity of established, likely-to-continue trade channels.'" *DuPont,* 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1161. Petitioner contends that "It is common sense that beer products such as those distributed by [Petitioner] and Respondent are sold in the same channels of trade, such as liquor stores, convenience stores, grocery stores, and bars."[22] Respondent counters that "There is zero evidence in the record to support this conclusory statement."[23]

But even where there is no evidence regarding channels of trade and classes of consumers, the Board is entitled to rely on the legal presumption that identical goods "travel in the same channels of trade to the same class of purchasers." *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) *cited in Zheng Cai v. Diamond Hong*, 127 USPQ2d at 1801 ("the TTAB properly followed our case law and presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods…."). So here, "we must presume that the channels of trade and classes of purchasers are the same. … Such trade channels include liquor stores, beer sections of grocery and convenience stores, and the like, as well as bars and restaurants, and the customers would include ordinary consumers." *In re Bay State Brewing Co.,* 117 USPQ2d 1958, 1959-60 (TTAB 2016).

Under the fourth *DuPont* factor, we consider "[t]he conditions under which and

[22] Petitioner's reply brief, 26 TTABVUE 15.

[23] Respondent's brief, 25 TTABVUE 23.

buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567. Respondent argues that Petitioner "has introduced no evidence whatsoever as to the sophistication, or lack thereof, of customers."[24]

As the Board has previously observed, however, "[b]ecause the respective identifications include 'beer' without any limit regarding a particular price point, we must treat the goods as including inexpensive as well as more costly beers, and therefore presume that purchasers for 'beer' include ordinary consumers who may buy inexpensive beer on impulse." *In re Bay State Brewing Co.,* 117 USPQ2d at 1960 n.4. So here, where there is no restriction in the subject registrations as to price or quality, there is no reason to infer that the consumers of the parties' beers will be particularly sophisticated, discriminating, or careful in making their purchases. *See Somerset Distilling Inc. v. Speymalt Whisky Dist. Ltd.*, 14 USPQ2d 1539, 1542 (TTAB 1989); *In re Bercut-Vandervoort & Co.,* 229 USPQ 763, 765 (TTAB 1986).

In sum, we find that the second through fourth *DuPont* factors all weigh in favor of finding a likelihood of confusion.

B. Strength of Petitioner's Mark

Under the fifth and sixth *DuPont* factors, we consider the strength of the cited registered mark, and the extent to which that strength may be attenuated by "[t]he number and nature of similar marks in use on similar goods." *DuPont*, 177 USPQ at 567.

[24] Respondent's brief, 25 TTABVUE 23-24.

Likelihood of confusion strength varies along a spectrum from very strong to very weak. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength, based on marketplace recognition. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength."); *Bell's Brewery, Inc. v. Innovation Brewing,* 125 USPQ2d 1340, 1345 (TTAB 2017); *McCarthy on Trademarks and Unfair Competition* § 11:80 (5th ed. Dec. 2020 update) ("The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another's use.").

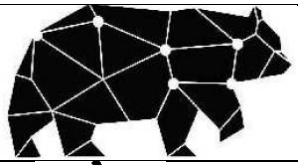
Here, BOXING BEAR, the dominant part of Petitioner's mark, is arbitrary as used on beer, and therefore conceptually strong. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks). But Petitioner has not introduced evidence of its sales or advertising under the mark, or other indicia of the mark's recognition among ordinary beer drinkers. *See Joseph Phelps Vineyards*, 123 USPQ2d at 1735. Absent this evidence of commercial strength, Petitioner's mark is entitled to no more than the presumption of validity accorded all registered marks under Section 7(b) of the Trademark Act. 15 U.S.C. § 1057(b). *Tea Bd. of India v. Republic of Tea Inc.,* 80 USPQ2d 1881, 1889 (TTAB 2006).

Respondent argues that:

> Petitioner's mark is weak and entitled to only limited scope of protection. The two main elements of Petitioner's mark, "boxing" and "bears" are both common in the alcohol industry, as is the combination of boxing or fighting animals, with numerous similar marks both in use in commerce and registered with the U.S. Patent and Trademark Office.[25]

In support, Respondent adduces:

- 48 third-party registrations in Classes 32 or 33 that use words or images relating to bears.[26] For example:

Registration No.	Mark	Pertinent Goods
5028203		Beer
5506515		Beer
5394623		Beer
1198190		Beer
5172310		Brewed malt-based beers

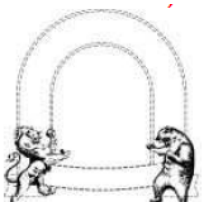
[25] Respondent's brief, 25 TTABVUE 15.

[26] 22 TTABVUE 2-23, 127-274.

- 18 third-party registrations in Classes 32 or 33 that use words or images relating to boxing.[27] For example:

Registration No.	Mark	Pertinent Goods
3851987	BOXER	Beer
5244795		Gin
5372542		Beers; brewed malt based beers; flavored beers.

- Five third-party registrations that use words or images relating to animals, including bears, fighting.[28] For example:

Registration No.	Mark	Pertinent Goods
3112011		Wine
5740850		Alcoholic beverages except beers
3992953		Beer

[27] 22 TTABVUE 23-31, 276-330.

[28] 22 TTABVUE 31-34, 333-349.

Petitioner, in its rebuttal notice of reliance, adduces 81 third-party registration certificates purporting to show lack of third-party use of "BRAWLING" "BOXING" OR "FIGHTING" bear imagery in marks for beer.[29] Although this evidence is admissible as an attempted rebuttal of Respondent's third-party evidence, it is of little or no probative value, as it is unaccompanied by a declaration showing that it results from an exhaustive search for such third-party registrations. Attorney assertions in briefs are not evidence. *Zheng Cai v. Diamond Hong*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) ("Attorney argument is no substitute for evidence.")). So the relative strength or weakness of Petitioner's mark rises or falls on the third-party evidence submitted by Respondent, the party that **is** motivated to adduce all evidence demonstrating the conceptual or commercial weakness of Petitioner's mark.

Respondent's third-party registration evidence is unaccompanied by evidence of the extent of **use** of those third-party registered marks in commerce in the United States.[30] "But … citation of third-party registrations as evidence of market weakness is unavailing because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have

[29] Exhibit D, 23 TTABVUE 3, 12-288.

[30] Respondent adds seven examples of Internet materials showing boxing themes in the advertising and marketing of beer and other alcoholic beverages. 22 TTABVUE 34-37, 351-384. But these materials do not demonstrate use in commerce of the third-party registered marks Respondent cites above. Moreover, the materials are for the most part foreign advertisements, with no indication of their exposure, if any, to the consuming public in the United States. *See In re Tracfone Wireless, Inc.*, 2019 USPQ2d 222983, at *3 n. 7 (TTAB 2019).

become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences." *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016). "We have frequently said that little weight is to be given such [third party] registrations in evaluating whether there is likelihood of confusion. The 'existence of [third-party] registrations is not evidence of what happens in the market place or that customers are familiar with them….'" *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) *quoted in part in In re Inn at St. John's,* 126 USPQ2d 1742, 1746 (TTAB 2018),*aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019).

"However, third-party registrations are relevant evidence of the inherent or conceptual strength of a mark or term because they are probative of how terms are used in connection with the goods or services identified in the registrations." *In re Morinaga,* 120 USPQ2d at 1745-46. Even where the record lacks proof of actual third-party **use**, third-party registration evidence may show that a term carries a descriptive or highly suggestive connotation in the relevant industry and therefore may be considered conceptually weak. *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.,* 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); s*ee Institut National Des Appellations D'Origine v. Vintners Int'l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992).

Respondent's evidence shows that a number of third parties have registered marks depicting bears, or boxing, or animals fighting. But none of these third-party marks comes as close to Petitioner's mark as Respondent's. Respondent's "BRAWLING BEAR," with its boxing bear design, is far closer to Petitioner's

"BOXING BEAR" than any of the third-party registered marks. *See Palisades Pageants, Inc. v. Miss Am. Pageant*, 442 F.2d 1385, 169 USPQ 790, 793 (CCPA 1971) (discounting the probative value of third-party registrations where "appellant's mark is closer to appellee's than even the closest of the third-party registrations"). None of the third-party marks combines the words and imagery as closely as the parties' marks. Consequently, the third-party registrations "do not diminish the distinctiveness of the cited mark or its entitlement to protection against [Respondent's] mark." *In re Information Builders Inc.,* 2020 USPQ2d 10444, *8 (TTAB 2020).

Thus, under the fifth and sixth *DuPont* factors, Petitioner's mark is entitled to the presumption of validity accorded it by Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), and Respondent's third-party evidence does not appreciably diminish its conceptual or commercial strength.

C. Similarity of Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Petitioner's and Respondent's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic Co.,* 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d at 1746, *aff'd mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). "[W]here ... the goods at issue are identical, the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines."

Zheng Cai v. Diamond Hong, 127 USPQ2d at 1801 (quoting *In re Viterra*, 101 USPQ2d at 1908). We base our findings on the recollection of the average consumer – here, the ordinary beer drinker – who normally retains a general rather than a specific impression of trademarks. *See In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014).

The marks, once again, are Petitioner's standard character BOXING BEAR BREWING COMPANY mark (with "BREWING COMPANY" disclaimed), and Respondent's composite BRAWLING BEAR BREWING and Design mark (with "BREWING" disclaimed):

Petitioner contends that:

> The words in both Respondent's Registration and Petitioner's Registration are so highly similar in sight, sound, and meaning so as to be functionally identical. As to similarity in the literal elements of both marks, both use the word "bear" and "brewing", with the only different word ("boxing" and "brawling") both beginning with the letter "b" and both ending in "ing"
> …

> The words "boxing" and "brawling" are also highly similar in meaning as they are both synonyms for "fighting" with analogous meanings and connotations, i.e., a method of fighting.[31]

Respondent maintains that "BOXING" and "BRAWLING" convey differing connotations and commercial impressions. It maintains that Petitioner's own dictionary evidence defines "boxing" as:

> • "the art of attack and defense with the fists practiced as a sport."
>
> • "the act, technique, or profession of fighting with the fists, with or without boxing gloves."
>
> • "the act, art, or profession of fighting with the fists, esp the modern sport practiced under Queensberry rules."[32]

Whereas "brawl" or "brawling" is defined as:

> • "to quarrel or fight noisily."
>
> • n. - "a noisy quarrel, squabble, or fight" v. – "to quarrel angrily and noisily; wrangle."
>
> • "to quarrel or fight noisily; squabble."[33]

According to Respondent, these definitions "provide a clear distinction between boxing, which is a fighting sport, and brawling, which is associated with a noisy quarrel, often involving more than two people (e.g., riot, free-for-all, melee)."[34]

Citing sports articles, Respondent further contends that:

---

[31] Petitioner's brief, 24 TTABVUE 11.

[32] Respondent's brief, 25 TTABVUE 21 *citing* Merriam-Webster.com, 23 TTABVUE 291, Dictionary.com, 23 TTABVUE 310-11.

[33] Respondent's brief, 25 TTABVUE 22 *citing* Merriam-Webster.com, 23 TTABVUE 299, Dictionary.com, 23 TTABVUE 314, 317.

[34] Respondent's brief, 25 TTABVUE 22.

> [I]n the world of professional fighting, the distinction between a "boxer" and a "brawler" has become a classic means of identifying fighters. … The Bleacher Report ranks the ten best "boxer vs. brawler" matchups in history. In explaining the distinction, the article asserts "[i]n a pure 'boxer vs. brawler' matchup, the brawler is going to get taken to school every time… A fighter skilled in the sweet science is going to handle an unrefined street fighter with little trouble."[35] …

Respondent concludes that:

> [T]he distinctions between "boxers" and "brawlers" are well-engrained into the common understanding of professional fighting. Thus, the distinctions between boxing and brawling are so well-entrenched in the common parlance that consumers are unlikely to be confused between the two with regard to the source of goods.[36]

As Petitioner correctly observes, though, the difference is only in degree. As the definitions show, "[b]oth 'boxing' and 'brawling' are simply different ways of fighting."[37] In fact, as the sports article quoted above shows, brawlers are a kind of boxer. The article describes professional boxers such as Roberto Duran: "a brilliant technical boxer, but the former Panamanian street kid was always a brawler at heart. His exquisite boxing just made him more dangerous" in his first match with boxer Sugar Ray Leonard.[38] The article goes on to describe the best boxer versus brawler matchup as Muhammed Ali versus Joe Frazier: "Frazier's relentless, pressure style was the near-perfect antidote to Ali's flashy, stick-and-move technique."[39] Even

---

[35] Respondent's brief, 25 TTABVUE 22 (quoting *Ranking the 10 Best "Boxer vs. Brawler" Matchups in History*, BleacherReport.com 12/15/2013) 22 TTABVUE 394-404.

[36] Respondent's brief, 25 TTABVUE 23.

[37] Petitioner's brief, 24 TTABVUE 11.

[38] *Ranking the 10 Best "Boxer vs. Brawler" Matchups in History*, BleacherReport.com 12/15/2013) 22 TTABVUE 402.

[39] *Ranking the 10 Best "Boxer vs. Brawler" Matchups in History*, BleacherReport.com 12/15/2013) 22 TTABVUE 420.

though one, Frazier, was more of a brawler, both were boxers.

Similarly here, Respondent's image of a bear standing in a boxing stance and "wearing boxing gloves," as its description of its mark states, reinforces the connotation and commercial impression that its "BRAWLING BEAR" is a kind of "BOXING BEAR".

The remaining disclaimed words, "BREWING" and "BREWING COMPANY," do little to dispel the marks' similarity. *See Citigroup Inc. v. Capital City*, 98 USPQ2d at 1257 ("[W]hen a mark consists of two or more words, some of which are disclaimed, the word not disclaimed is generally regarded as the dominant or critical term.") *quoted in In re Aquitaine Wine USA, LLC,* 126 USPQ2d 1181, 1186 (TTAB 2018). They do, however, enhance the marks' similarity in sound, as BRAWLING BEAR BREWING conveys the same alliterative sound and cadence as BOXING BEAR BREWING, the first three words of Petitioner's mark. *See In re Detroit Athletic,* 128 USPQ2d at 1049 ("Detroit Athletic Co" similar in cadence to "Detroit Athletic Club").

To ordinary beer drinking consumers, Respondent's BRAWLING BEAR BREWING and Design mark, taken in its entirety, may appear to be nothing more than a variation on Petitioner's mark, BOXING BEAR BREWING COMPANY. "Even those purchasers who are fully aware of the specific differences between the marks may well believe, because of the similarities between them, that the two marks are simply variants of one another, used by a single producer to identify and distinguish companion lines of goods." *In re Great Lakes Canning, Inc*., 227 USPQ 485, 485 (TTAB 1985).

Consequently, the similarity of the marks in connotation and commercial impression, as well as sight and sound, weighs in favor of finding likelihood of confusion under the first *DuPont* factor.

D. Actual Confusion

Under the seventh and eighth *DuPont* factors, we consider the nature and extent of any actual confusion, in light of the length of time and conditions under which there has been contemporaneous use of the parties' subject marks. *DuPont*, 177 USPQ at 567.

Petitioner, answering one of Respondent's interrogatories, averred that "it first Learned of Respondent's use of Respondent's Mark through actual customer confusion. Such customers viewed Respondent's Mark used in connection with beer products and inquired whether such products were offered by Cerevisiae, which they were not. A screenshot of a text message received by [Petitioner's] principal regarding actual confusion is being produced by [Petitioner] in its document production."[40] Petitioner produced the screenshot of the text message, sent to one of Petitioner's partners, but declined to identify the person sending the message.[41] It admits that this is the only physical, tangible, or other documentary evidence in its possession, custody, or control that purports to show actual confusion.[42]

[40] Petitioner's answer to Respondent's interrogatory no. 3, Respondent's first notice of reliance, ex. 3, 19 TTABVUE 37-38; *see also* Petitioner's answer to interrogatory no. 22, 19 TTABVUE 47-48.

[41] Petitioner's answer to Respondent's interrogatory no. 21, Respondent's first notice of reliance, ex. 3, 19 TTABVUE 47.

[42] Respondent's first notice of reliance Ex. 1, Petitioner's responses to Respondent's requests for admission nos. 30, 37, 46, 19 TTABVUE 13-14, 16.

Although Petitioner designated this text message screenshot as confidential, we agree with Respondent that this confidential designation is improper, and exercise our discretion to display it in pertinent part:

[43]

Respondent argues that "The sender's comment, 'why are THEY biting YOU so hard' (emphasis added) demonstrates that the sender clearly understood the product to be manufactured by someone other than Petitioner."[44] Petitioner replies: "However, a message to [Petitioner] via text message directly only demonstrates that

[43] Respondent's second notice of reliance, 21 TTABVUE 6. The Board may treat as not confidential material that cannot reasonably be considered confidential, notwithstanding a designation as such by a party. Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g); *AT&T Mobility LLC v. Thomann and Dormitus Brands LLC*, 2020 USPQ2d 53785, *12 (TTAB 2020).

[44] Respondent's brief, 25 TTABVUE 14.

the consumer has a heightened level of familiarity with [Petitioner] Mark, owner, and overall business. The average consumer, who presumably would not be on a casual texting basis with [Petitioner], would not have this same level of awareness."

In our estimation, the text comment about the similarity of the parties' marks was apparently made by a person familiar with one of Petitioner's partners. It might more accurately be described as an expression of concern that the parties' similar marks could engender confusion on others' behalf. *See National Rural Elec. Coop. Ass'n v. Suzlon Wind Energy Corp.,* 78 USPQ2d 1881, 1887 (TTAB 2006), *aff'd*, 214 Fed. Appx. 987 (Fed. Cir. 2007) (One instance of an e-mail asking if the defendant's mark might be an infringement was not sufficient evidence of a likelihood of confusion. "We are not persuaded that this single instance of alleged actual confusion is significant."). The partner's response, "Brawling Bear!?! Gtfoh" expresses some level of disbelief or incredulity, but no more.[45]

We find that this evidence does not show actual confusion, but at the same time, does not diminish the likelihood of confusion engendered by the similarity of the parties' marks on identical goods. First, it is not necessary to show actual confusion in order to establish likelihood of confusion. "While evidence of actual confusion may be considered in the *DuPont* analysis, a showing of actual confusion is not necessary to establish a likelihood of confusion." *In re i.am.symbolic, LLC,* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017) (internal punctuation omitted). Second, the extent of

[45] The acronym "GTFOH" means "get the fuck out of here," a shorthand expression of disbelief. Respondent's fourth notice of reliance, exs. 91-92, UrbanDictionary.com, Acronyms.TheFreeDictionary.com, 20 TTABVUE 6-8.

use of the parties' marks in the marketplace is unknown, so we are at a disadvantage to gauge the opportunity for actual confusion to have occurred. *See Cunningham v. Laser Golf*, 55 USPQ2d at 1847. And third, the marks have been in contemporaneous use for only a little over three years, affording little opportunity for actual confusion to have occurred. *See Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC,* 122 USPQ2d 1030, 1039-40 (TTAB 2016).

Accordingly, the seventh and eighth *DuPont* factors are neutral.

E. Respondent's Bar and Pub Services

Respondent's registration also identifies "bar services; pubs" in International Class 43. Petitioner claimed "common law rights in brewery, taproom and brewpub services,"[46] but presented no evidence of these claimed common law rights in its case in chief. Its case must rest, then, on proving a likelihood of confusion between its registered mark for "beer" and Respondent's registered mark for "bar services; pubs."

As we consider Petitioner's goods and Respondent's services, "we must determine whether their degree of relatedness rises to such a level that consumers would mistakenly believe the parties' goods and services emanate from the same source." *Tao Licensing, LLC v. Bender Consulting Ltd.,* 125 USPQ2d 1043, 1060 (TTAB 2017). Whether a likelihood of confusion exists in such a case is a question of law, "based on underlying factual determinations." *In re St. Helena Hosp.*, 113 USPQ2d at 1084. "As we have long held, each case must be decided on its own facts and the differences are often subtle ones." *Id.* at 1087 (internal punctuation omitted).

[46] Petitioner's brief, 24 TTABVUE 12.

In a similar case, *In re Coors Brewing*, the Federal Circuit Court of Appeals held that "something more" than the fact that restaurants serve beer was required to show the relatedness of applicant Coors' beer and the registrant's restaurant services, even though their BLUE MOON composite marks had identical wording, and differed only in their designs. *In re Coors Brewing Co.,* 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). The evidence of relatedness—references discussing restaurants' practice of offering private label house brands of beer, articles about brewpubs, which brew their own beer, and third-party registrations showing a single mark for beer and restaurant services—did not meet this "something more" requirement, in the Court's view. *Id. See also In re St. Helena Hosp.*, 113 USPQ2d at 1087 ("In situations … in which the relatedness of the goods and services is obscure or less evident, the PTO will need to show 'something more' than the mere fact that the goods and services are 'used together.'") *quoted in In re Country Oven, Inc.,* 2019 USPQ2d 443903, *13 (TTAB 2019). The Court noted, however, that there could be a clear relationship between beer and brewpubs, which brew their own beer. *In re Coors Brewing*, 68 USPQ2d at 1064, *quoted in Pierce-Arrow Soc'y v. Spintek Filtration, Inc.,* 2019 USPQ2d 471774, *12–13 (TTAB 2019).

In this case, Petitioner fails to establish the relatedness of the parties' goods and services. Microbreweries and brewpubs may be more plentiful now than in 2003, when *In re Coors* was decided, but there is no evidence to this effect in the record. Respondent may prove to be a microbrewery, operating a brewpub, but the record is silent on this issue. Unlike *In re Coors* and *In re St. Helena*, Respondent is not an applicant, but a registrant; it owns a registration, which is entitled to a presumption

of validity, and that presumption of validity can only be overcome by a preponderance of the evidence. *Cunningham v. Laser Golf*, 55 USPQ2d at 1848. The evidence here is insufficient to carry that burden of proof. On this record, we cannot conclude that the degree of relatedness rises to such a level that consumers would mistakenly believe the parties' goods and services emanate from the same source. *Tao v. Bender,* 125 USPQ2d at 1060.

Consequently, the second *DuPont* factor weighs against finding a likelihood of confusion with respect to Respondent's services.

VI. Conclusion

We have considered of all of the evidence of record and all of the arguments of the parties, as they pertain to the relevant *DuPont* likelihood of confusion factors. We find that Petitioner's registered BOXING BEAR BREWING COMPANY mark is similar to Respondent's BRAWLING BEAR BREWING and Design mark. Respondent's third-party evidence does not demonstrate conceptual or commercial weakness on the part of Petitioner's mark. The goods identified in Petitioner's cited registration are identical to Respondent's identified goods; the parties' goods are presumed to travel through the same channels of trade to the same class of customers, who cannot be expected to exercise sophistication and care in their purchases. For these reasons, we find by a preponderance of the evidence that there is a likelihood of confusion between the parties' marks as used on their respective identified goods, under Section 2(d). 15 U.S.C. § 1052(d).

Petitioner has not, however, shown by a preponderance of the evidence that its identified goods are related to Respondent's identified services under Section 2(d).

Decision: The petition for cancellation is **granted** as to Respondent's Class 32 goods, beer, and **denied** as to Respondent's Class 43 services, bar services and pubs. Registration No. 5530795 will accordingly be restricted to its Class 43 services, bar services and pubs.